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No. 528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NORRIS EDWARD BASS
D/B/A N. E. BASS, APPELLANT

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
ATLANTIC GREYHOUND CORPORATION
CAROLINA COACH COMPANY, INC.
EASTERN GREYHOUND LINES
RICHMOND GREYHOUND LINES, INC.
VIRGINIA STAGE LINES, INC.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

ANSWER OF APPELLANT TO THE MOTION TO AFFIRM FILED BY APPELLEES

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STATEMENT

Appellant filed with the Interstate Commerce Commission an application under 49 U. S. C. 309 (a) seeking a permit authorizing him to engage in transportation as a contract carrier of passengers. The motor carriers, appellees

here, appeared at the hearing in opposition to the application of appellant. The Commission denied the application (J. St. 22-26) and suit was instituted in United States District Court for the Western District of Virginia to set aside and annul the order of the Commission. The case was heard by a three-judge District Court and the petition denied (J. St. 17-21).

Congress, in its wisdom, provided the public with two classes of motor carrier passenger service and it is important to a proper determination of the issues here presented to understand the two classes of carriers and what each can and cannot do. One class is the service rendered by a common carrier under a certificate *(49 U. S. C. 303 (5) (14)* and *49 U. S. C. 307 (a))*, and that class of carriers is a common carrier holding itself out to the general public to transport passengers and property for compensation, *49 U. S. C. 303 (14)*, and that class must serve all who seek its services and, under the Act, it must serve them without unjust discrimination and adhere to published rates, so said the Commission in *1 M. C. C. 628 (630)*.

The other class of carrier is a contract carrier and that class is any person which, under individual contracts or agreements, engages in transportation of passengers for compensation, *49 U. S. C. 303 (15)*, and that class is free to pick and choose among shippers and under the Act may discriminate in its services to them and its charges may be called in question only if they are found to fall below a reasonable minimum level, so said the Commission in *Contracts of Contract Carriers, 1 M. C. C. 628 (630)*.

Both the motion of the United States and the motion of the motor carriers deal with the same proposition, which is expressed by the United States to be: "It (the Commission) ruled that appellant's proposed service is not essentially different from that offered and afforded by the opposing motor common carriers and that since appellant had not established that his proposed service met any need which

existing carriers could not satisfy, he had failed to make the showing required by Section 209 (b) of the Act, i. e., that the proposed operations will be consistent with the public interest and the National Transportation Policy declared in the Act. Also that appellant's operations were not within exemption (9) of Section 203 (b) of the Act." (49 U. S. C. 303 (b)).

The opposing motor carriers and the United States approach the proposition from somewhat different positions and for that reason we will direct our reply to the general proposition stated in the appeal.

The motor carriers, appellees, at sheets 6 and 7 of their motion to affirm, refer to certain amendments to the Motor Carrier Act effective in August 1957. The amendments have no bearing on the issues in this proceeding as the application was filed in September of 1956 or eleven months before the amendments and the application is to be determined by the laws in effect when the application was filed.

THE DIFFERENCE

Congress provided that a common carrier must transport passengers for the general public for compensation, *49 U. S. C. 303 (14)*. The Commission in *1 M. C. C. 628 (630)* said of the common carrier that:

> "The common carrier holding itself out to that traffic of a certain description must serve all who seek its service, and under the Act, it must serve them without unjust discrimination and adhere to published rates."

Congress then provided that a contract carrier is any person which, under individual contracts or agreements, engages in the transportation of passengers for compensation, *49 U. S. C. 303 (15)*. The Commission in *1 M. C. C. 628 (630)* said of the contract carrier that:

> "The contract carrier is free to pick and choose among shippers, and under the Act it may discriminate in its services to them and its charges may be called in question only if they are found to fall below a reasonable minimum level."

It is obvious from the above showing that the order of the Commission and the decision of the District Court are per se contrary to law and that substantial questions are presented for determination by this Court.

ARGUMENT

The report of the Commission shows that the application is supported by a Boy Scout executive, a superintendent of public schools for Campbell County, Virginia, and a minister (a Negro preacher); that for the past four years, the Boy Scout executive has arranged for use of applicant's service between Lynchburg and Cimarron; that under the arrangements made, applicant's bus is leased to the group for the entire journey so that unscheduled side trips may be taken by the group enroute and upon arrival at Cimarron; and that other carriers have been utilized for these trips but due to extra charges for side trips and the inflexibility of the operation once the contracts have been arranged, their service has not been as satisfactory as that of applicant (J. St. 24).

Not withstanding the uncontradicted testimony of the witnesses for applicant to the effect that the service of the common carriers is not as satisfactory as the service of applicant due to the extra charges for side trips and the inflexibility of the operation of the common carriers once the contracts have been arranged, the report of the Commission shows:

> "That the supporting witnesses have presented no evidence to indicate that the group transportation desired by them cannot be performed by these

> common carriers under the Commission's rules and regulations as set forth in the Chartered Party Service Case; that the proposed service is not essentially different from that offered and afforded by the opposing motor common carriers; and that we are unable, therefore, to agree with applicant's contention (1) that the proposed service is that of a contract carrier, and (2) that since only common carrier service is now available, a grant of the application would be consistent with the public interest and the National Transportation Policy."
>
> (J. St. 25, 26)

A reading of Section 209 (b) of the Act, *49 U. S. C. 309 (b)* to find out what appellant must prove, along with the conclusions expressed by the Commission as pointed out above, will remove all doubt that the order of the Commission is unlawful and must not be permitted to stand.

In view of the conclusion the Commission reached, which was sustained by the District Court, it becomes necessary to answer the motion to affirm by distinguishing between a common carrier and a contract carrier and to show what the Act requires an applicant for a permit to prove in order to operate as a contract carrier and the meaning of "consistent with the public interest" as used in the Act and by the Commission. From these disclosures, it will become abundantly clear that the Commission denied the application of appellant contrary to law and that the District Court erred in sustaining the Commission.

THERE IS A DIFFERENCE BETWEEN COMMON AND CONTRACT CARRIERS.

The Act itself defines a common carrier as being any person which holds itself out to the general public to engage in transportation of passengers or property for compensation, *49 U. S. C. 303 (14), J. St. 28)*, and the same act defines a

contract carrier to be any person which, under individual contracts or agreements, engages in the transportation of passengers or property for compensation, *49 U. S. C. 303 (15), J. St. 28.*

The statute is clear that there is a difference between the services of a common carrier and the services of a contract carrier which difference the Commission, contrary to law, failed and refused to recognize in this proceeding. The Commission itself makes a difference between these carriers and has held that the common carrier performs a service resulting from an undertaking to serve the public indiscriminately, up to the capacity of its equipment and within the limits of its undertaking, *Scott Bros., Inc. 2 M. C. C. 155 (161).* But the Commission says that a contract carrier, on the other hand, is in reality only a form of private carriage, *see 1 M. C. C. 628.* The difference, therefore, is in the service—one, a common carrier, is a public carrier, and the other, a contract carrier, is a form of private carriage.

The Commission distinguishes between the two classes of carriers in *1 M. C. C. 628 (630), Contracts of Contract Carriers* as follows:

> "A contract carrier has certain inherent advantages in competition over a common carrier. There is a great difference in the conditions under which traffic can be hauled for shippers by motor carriers, even when the traffic is of the same kind. Naturally the traffic of the larger shippers, who can offer volume and steady movement, is particularly desirable. The common carrier holding itself out to that traffic of a certain description must serve all who seek its services, and under the Act, it must serve them without unjust discrimination and adhere to published rates. The contract carrier, on the other hand, is free to pick and choose among shippers, and under the Act it may discriminate in

> its services to them and its charges may be called in question only if they are found to fall below a reasonable minimum level. *By reason of these circumstances, contract carriers are enabled to give a higher type of special and personal service to their shippers than is possible for common carriers;* and it is the need and demand for this service which constitute the chief of their justification for the contract carriers in the present motor transportation system. (Emphasis mine)

The above decision of the Commission clearly shows the difference in operation, service, etc., between a common carrier and a contract carrier. Therefore, we come to the inescapable conclusion that the Commission erred as a matter of law and acted contrary to the Motor Carrier Act when it denied the application of appellant on the grounds that the proposed service is not essentially different from that offered and afforded by the opposing motor common carriers and that applicant should show that there is a real need for the proposed service which cannot be met by existing carriers when, as here, the record shows that the service of the opposing common carriers is not what the witnesses need. Furthermore, these opposing common carriers cannot, under the law and the decision of the Commission in *Contracts of Contract Carriers, 1 M. C. C. 628,* perform contract carrier service. In fact, these opposing common carriers can only render special or chartered party service under their certificate as a common carrier, *49 U. S. C. 308, J. St. 30).* If Congress had intended that common carriers of passengers should render contract carrier passenger service, Congress would have used the words "contract carrier passenger service" instead of "special or chartered parties" as it did use in *49 U. S. C. 308 (c).* Moreover, if Congress did not intend for the public to have contract carrier passenger service in addition to special or chartered party passenger service, Congress

would *not* have provided in *Section 203 (15)* and *Section 209 of the Motor Carrier Act, 1935, 49 M. C. C. 303 (15)* and *49 U. S. C. 309(b)* for contract carrier passenger service. Therefore, since Congress provided for contract carrier passenger service to be rendered under a permit by a contract carrier and provided for special or chartered parties passenger service to be rendered under a certificate by a common carrier, it is contrary to law to deny contract carrier passenger service by a contract carrier notwithstanding the adequacy or inadequacy of common carrier service because the Commission itself has held that the service of a contract carrier and that of a common carrier are different and are not similar nor are the same. In fact, the Commission said contract carrier service is special or personal service and common carrier service is service to all the public without unjust discrimination. The above discussion shows conclusively that the denial of contract carrier service is improper as a matter of law.

The charter bus service of common carriers as permitted in *49 U. S. C. 308* is not contract carrier service because it is only equivalent to contract carrier service as the motor carriers appellees point out at sheet 4 of their motion as follows:

> "This is particularly true in charter bus service, as the nature of such service renders it the equivalent of contract carrier service. See Rule 2 of *Regulations, 29 M. C. C. 25, 47.*"

The equivalent is not contract carrier service and that fact shows the decision of the Commission and the Court to be wrong as a matter of law.

The Commission further distinguishes contract carrier service from common carrier special or chartered passenger service by defining special or chartered parties as meaning a group of persons who, pursuant to a common purpose and

under a single contract, have acquired (get this if you please) the exclusive use (not service) of a passenger-carrying motor vehicle (not service but a vehicle only) to travel together as a group to a specified destination or for a particular itinerary, *29 M. C. C. 25, 47-48.* A contract carrier, on the other hand, operates only under individual contracts or agreements rendering special or personal service (not vehicles). There is a difference as shown above in service and operation, as a matter of law, between the operation of a common carrier and a contract carrier and the Commission and the District Court cannot lawfully merge passenger service rendered by contract carriers with passenger service rendered by common carriers when Congress completely divorced these two classes of service and carriers and provided that the public shall have available both classes of carrier service.

Before leaving the definition the Commission fixed for special or chartered parties for common carriers of passengers, it is well to recall to memory the evidence of the applicant which was to the effect that other carriers have been utilized for these trips, but due to extra charges for side trips and the inflexibility of the operation once the contracts have been arranged, their service is not as satisfactory as that of applicant. Consequently, the equivalent to contract carrier service is not contract carrier service because it is not special or personal service.

The record shows conclusively that the service of the opposing motor common carriers is not that of a contract carrier and not the kind of service proposed by appellant. There is a reason why the opposing motor common carriers cannot render contract carrier service. First, Congress did not permit common carriers of passengers to render contract carrier service and if those carriers are rendering contract carrier service as defined in *Section 203 (15) of the Motor Carrier Act, 49 U. S. C. 303 (15)*, then they are conducting unlawful operation as Congress specifically provided

that common carriers can conduct operations for the general public, *49 U. S. C. 303 (14)*. Secondly, Congress provided that common carriers of passengers defined in *Section 203 (14), 49 U. S. C. 303 (14)*, may transport to any place special or chartered parties under such rules as the Commission shall have prescribed. Please note that Congress did not give common carriers of passengers the authority to conduct operation as a contract carrier. The service of a common carrier in special or chartered parties must be rendered to all without unjust discrimination and at the published rates. The services of a contract carrier can be discriminatory and those carriers can pick and choose whom they will serve, *1 M. C. C. 628 (630)*. Thirdly, the Interstate Commerce Commission specifically provided that a group of persons, with a common purpose, can acquire the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, *29 M. C. C. 25, 47-48*. Under the definition of special or chartered parties of the Commission, a group of people may acquire from a common carrier the exclusive use of a *passenger-carrying motor vehicle* but not transportation service from a common carrier. There is a difference between acquiring the use of a vehicle and receiving service. Obviously, a common carrier cannot render contract carrier passenger service under the Act or under the rule prescribed by the Commission. Consequently, the denial of the application of appellant was contrary to law as the special or chartered party service of common carriers is not contract carrier service within the meaning of the Act.

THE PROOF REQUIRED IS FOUND IN THE ACT.

Section 209 (b) of the Motor Carrier Act, 49 U. S. C. 309 (b), provides that a permit shall be issued to any qualified applicant for a permit authorizing in whole or in part the operation covered by the application if it appears from the application or from a hearing held thereon, that

the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle * * *, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the National Transportation Policy declared in this Act.

In response to the application for a permit under the Act, the Commission denied the application of appellant on the erroneous theory and contrary to the specific mandate of Congress, on the grounds by holding:

> "That the burden of proof is upon applicant to show that there is a real need for the proposed service which cannot be met by existing carriers. No such showing has been made, and, in the circumstances, we have no alternative but to deny the application." (J. St. 26)

Section 209 (b) of the Motor Carrier Act, 49 U. S. C. 309 (b) did not require applicant to prove that there is a real need for the proposed service which cannot be met by existing carriers. The permit, so states *Section 209 (b)* shall be issued (no option allowed) to any qualified applicant when it appears the applicant is fit, willing and able to properly perform contract carrier service. No one claims that applicant is not fit, willing and able to perform contract carrier service. The record shows the applicant to be fit, willing and able to perform contract carrier service. Obviously, the Commission, in denying the application of appellant, acted contrary to law and its order is unlawful and must be set aside.

We hasten to point out that we did not state the further requirement of the Act which is that the proposed operation, to the extent authorized, will be consistent with the public interest and the National Transportation Policy. We shall now discuss public interest.

THE MEANING OF CONSISTENT WITH PUBLIC INTEREST.

Please bear in mind that the Commission held that the burden of proof was upon applicant to show that there is a real need for the proposed service which cannot be met by existing carriers. In so holding, the Commission placed upon the statutory requirement "consistent with the public interest" an unlawful interpretation of that phrase and an interpretation contrary to its own interpretation as follows:

> "In determining the question of consistency with the public interest, it is essential that we form some conception of the meaning of that phrase as used in the statute. The phrase is used in several places in the Act. In section 213, it is used in contrast with the phrase "promote the public interest". It follows from this use that its true meaning is that of "not contradictory or hostile to the public interest". Such decisions as we have been able to find support this interpretation of the phrase. They are as follows:
>
> *"State v. Superior Court, 126 Pac. 920; Ryan v. Roach Drug Co., 239 Pac. 912; Baldwin-Heckes Co. v. Kammerlohr, 242 N. W. 661; Shay v. Roth, 221 Pac. 967, 969; In re North Terrace Park, 48 S. W. 860, 863; Swan v. United States, 9 Pac, 931, 933; Borough of Oakland v. Board of Conservation, 118 Atl. 787, 788; Canellos v. Zolalis, 177 N. W. 133, 135; Electric Public Utilities Co. v. West, 140 Atl. 840.*
>
> "With this conception of the meaning of the phrase, we are of the opinion that the proposed operations are not hostile to the public interest and that in point of fact by rendering more flexible the rendition of the proposed service and affecting economies

> both in time and money, the public will ultimately receive benefit from the rendition of them by this carrier. We find that the statutory requirements have been met." *Scott Bros., Inc. 2 M. C. C. 155 (164).*

In this proceeding, the Commission held "consistent with the public interest" to mean that the service proposed is not that of a contract carrier and that since only common carrier service is now available, that a grant of the application will not be consistent with the public interest. But in *2 M. C. C. 155 (164)* after great search, the Commission found the statutory meaning of "consistent with the public interest" to be "not contradictory or hostile to the public interest." In fact, even if the contract carriers' service is unfavorable to the common carriers, still it must be granted because the commission said:

> "There is nothing inconsistent with the public interest in providing the public with improved service even if it should have an unfavorable effect on the revenue of protestants." *Trans-American Freight Lines Purchase Harold D. Gorman, 5 M. C. C. 712 (713).*

The record shows that there is no contract carrier passenger service available; that the service of existing common carriers is not as satisfactory as that of applicant and that the law specifically prohibits common carriers of passengers from conducting contract carrier service, the kind of service the Commission defines as in reality only a form of private carriage.

It is crystal clear from the statute and from the decisions of the Commission that there is a great difference in service between that rendered by a common carrier of passengers and that rendered by a contract carrier of passengers and that the transportation by common carriers of special or

chartered parties is only the equivalent of contract carrier service but is not, in law or fact, contract carrier service. Consequently, there is no contract carrier service available and since the statute provides for contract carrier passenger service, the absence of that service makes the denial of the application of appellant contrary to law and the National Transportation Policy.

EXEMPTION UNDER (9) OF 49 U. S. C. 303

The appellees contend that the intrastate operation of appellant puts him not within the provisions of *Exemption (9), of 49 U. S. 303.*

The Interstate Commerce Act has no application over operations conducted by any person solely within a single state, *49 U. S. C. 302(b)*, as that provision provides that nothing in the Motor Carrier Act shall be construed to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof. The holding that appellant because he is operating for the State of Virginia in transporting school children to and from school, is engaged in transportation as a regular occupation or business, is a direct interference with the exercise by the State of the power of regulation of intrastate commerce. The operation of the appellant in transporting school children is done under the wing of the State and for the State. The Commonwealth of Virginia, if it was actually and physically transporting the school children in its own buses, no one could say that such operation is a regular occupation or business of the State. Consequently, when an agent performs a duty for a principal, the agent's authority can never rise higher than that of his principal. The principal being exempt from conducting transportation as a regular occupation or business, the agent is likewise exempt. In law, therefore, the casual, occasional or reciprocal trips made by appellant in transporting passengers to points beyond the state line fall squarely within the provisions of *49 U. S. C.*

303 (21) (b) (9), exempting such operation from the regulation of the Commission except the safety and hours and wage provisions of the Act.

CONCLUSION

The issues in this proceeding are so substantial as to require plenary consideration, with further briefs on the merits, and oral argument for their resolution. The motions of the appellees, the jurisdictional statement and this answer to the motion show also that the issues are substantial, which issue require determination on their merits by the Court.

The motions to affirm should be overruled and the relief sought by appellant granted.

Respectfully submitted.
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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January, 1959, served a copy of the foregoing Answer of Appellant to the Motion to Affirm filed by Appellees upon the counsel of record as listed below by first class U. S. Mail, with postage prepaid and addressed as follows:

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